

(2010) 07 DEL CK 0377

Delhi High Court

Case No: Ex. P. No. 50 of 2001

Inox Air Products Ltd.

APPELLANT

Vs

Harshita Ltd.

RESPONDENT

Date of Decision: July 26, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 58, Order 21 Rule 58(1), Order 21 Rule 58(2), Order 21 Rule 90, 151
- Companies Act, 1956 - Section 537
- Limitation Act, 1963 - Article 127

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: K.R. Chawla, Pankul Nagpal, Pravir K. Jain, for the Appellant; B.S. Mann, for the Respondent

Judgement

Manmohan Singh, J.

By this order I shall dispose of the pending EAs filed by the Objector/Punjab National Bank. The brief facts are that the decree holder had obtained an ex parte decree for sum of Rs. 11,43,3237.88 together with costs and interest @ 18% by decree and judgment dated 25th August 2000 in Suit bearing No. 1107/98 against M/s. Harshita Ltd., Somnath Chambers II, New Delhi hereinafter referred to as judgment debtor.

2. The decree-holder has filed the present execution petition and prayed for warrant of attachment in respect of moveable properties mentioned in the list of properties annexed as Annexure "B" and for Immovable properties mentioned in the list of property as Annexure "C".

3. Annexure "C" which contains the details of the Immovable properties sought to be attached and sold reads as under:

Property No. 307 approximately 525 sq. ft, Somdutt Chambers II, Bhikaji Cama Place, New Delhi.

4. That in order to decide the pending EAs filed by the Objector it is necessary to refer few orders passed by the court. The Execution was first time listed before court on 15th March 2001. The court issued the warrants for attachment in respect of the properties mentioned in Annexure "B" and "C" and also ordered that the judgment debtors shall not create any charge on the properties till the next date of hearing. Upon service of warrants of attachment by order dated 18th March, 2003, the matter was put up before the Joint Registrar to prepare a schedule of the properties put to auction and report back after the properties are auctioned.

5. On 8th July 2003 an order was passed by the Joint Registrar that in terms of order dated 18th March 2003 the property bearing No. 302-307, Somdutt Chambers II, New Delhi was put up for auction. The proclamation of sale of the said property was ordered to be issued by way of public auction as per the details given in the order. Later on in EA 593/03 it was ordered on 22.08.2003 that the schedule of the sale of the property as directed be issued.

6. In compliance of orders, the public auction in terms of warrants of attachment was issued in the Statesman on 19th September 2003 and Nav Bharat Times on 20th September 2003. The notice by way of beat of drums and affixation was also issued on 7th September 2003.

7. The applications were filed by the owners of Flat No. 303 and 304 stating that they have nothing to do with the judgment debtors and in view of the documentary evidence placed on record, their flats may not be put to sale for execution of warrants of attachment issued by this Court. Interim orders were passed with the consent of the learned Counsel for the decree holder to the effect that their flats shall not be put to sale in execution of warrants of attachment issued by this Court.

8. The auction for Flat No. 306 and 307 was held on 7th November 2003. The report of the Court Auctioneer dated 3rd November, 2003 and 7th November, 2003 are placed on record. Therefore, three further EA Nos. 11/04, 12/04 and 13/04 out of which two were filed by the auction purchasers of Flat No. 307 and the third one was on behalf of the court Auctioneer. The same were listed before court on 3rd March, 2004 when counsel for the objector also appeared. The details are given as under:

a) EA 11/04 was filed by the auction purchaser of Flat No. 307 praying that the sale certificate be issued to the auction purchaser by declaring the sale as absolute and possession may also be directed to be given to the auction purchaser of Flat No. 307.

b) E.A. No. 12/04 was filed by the auction purchaser of Flat No. 306 with the similar prayer.

c) The third application being E.A. No. 13/04 was filed by Court auctioneer praying to release his commission of Rs. 26,400/- and the government share of 5% of the total amount received from the two auction purchasers namely Shri Kuldip Singh S/o Sh. Bir Singh who is the auction purchaser of property No. 306 and property/flat No. 307 of Sh. B.K. Soni (HUF). The total sum of auction of two flats 306 and 307 comes to Rs. 13,60,000/-.

9. A notice for 15th March, 2004 to these applications was issued and further directions were issued to the court auctioneer to file an affidavit for holding of public auction in terms of directions given by the court.

10. By order dated 15th March, 2004, the bid of two auction purchasers in respect of two Flat Nos. 306 and 307 was accepted and court passed an order for issuance of sale certificates and warrants of possession in favour of the auction purchasers. Out of the deposited sale amount a sum of Rs. 6575/- was remitted to the Government towards expenses for auction and a sum of Rs. 26,400/- was ordered to be deducted and paid to the court auctioneer as her fee. It was further ordered that the balance amount be released in favour of the decree-holder after the warrants of possession are executed.

11. Later on Punjab National Bank, the objector had filed four applications being EA No. 197/2004, EA No. 250/2004, EA No. 251/2004 and EA No. 67/2005. The first application being EA No. 197/2004 was filed by the objector under Order 21 Rule 58 CPC on 22.4.2004 for adjudication of claim relating to rights and interest in property bearing No. 307, Som Dutt Chambers-II, Bhikaji Cama Place, New Delhi, mainly on the ground that the objector was secured creditor of M/s. Harshita Limited previous owner of the said flat with other several immovable properties against availing several financial limits from the objector. Left with no option, the objector was constrained to file an application before the Debt Recovery Tribunal for recovery of its dues i.e. Rs. 5,27,50,219.83 p along with interest both pendent elite and future from the date of filing of OA till the realization of the amount. The said proceedings were pending. It is contended that since the flat in question was the mortgaged property with the objector, therefore, the said flat could not be subject matter of the auction/attachment before this Court. Therefore, it was prayed that the objection filed by the objector be adjudicated upon relating to attachment or sale of the property bearing No. 307, Som Datt Chambers-II, Bhikaji Cama Place, New Delhi.

12. On 22.06.2004 Pubjab National Bank/objector filed second application under Order 21 Rule 58 and Rule 90 CPC being EA No. 250/2004 for adjudication of the claim of the objector in relation to property/flat No. 306, Som Datt Chambers-II, Bhikaji Cama Place, New Delhi, being the first and paramount equitable mortgage charge. In addition to the facts stated in the first application, it was contended by the objector that the Flat No. 306 was also mortgaged in favour of the objector who has the first and paramount charge over the said flat as well other properties. It is stated that against this flat also proceedings for recovery were pending before the

Debt Recovery Tribunal being O.A. No. 259/1999 and during the course of pendency of the said proceedings it transpired that M/s. Harshita Limited had been ordered to be wound up in accordance with the provision of the Companies Act by the Rajasthan High Court vide order dated 29.8.2003 in Company Petition No. 44/2000 titled as Indbank Merchant Banking Services Ltd. v. Harshita Limited and Official Liquidator was directed to attach all the properties of Harshita Limited and take charge thereof and in fact the objector had moved the application before the Tribunal to implead the Official Liquidator as one of the parties in the said proceedings.

13. It was stated that now all of a sudden it had transpired that the property No. 306 which was equitably mortgaged with the objector by Sh. Satish Chandra Sharma had been sold by the auctioneer in the present execution proceedings and as such the objector who had first and paramount charge of the said property/flat No. 306 prayed in the application to set aside the sale on the ground of material irregularity in auctioning of the said property/Flat No. 306 as the fraud had been played in publishing the sale proclamation or conducting the sale in respect of the said flat as the said flat could not have been put to auction on various grounds, namely, that Schedule-C of the list of immovable properties does not contain the property/Flat No. 306. Therefore, the said property could not have been auctioned or put to sale for the purpose of recovering any amount due and payable by M/s Harshita Limited. Further it was stated that the said flat is owned by Sh. Satish Chandra Sharma in his personal capacity who had delivered the title deed of the said property to the objector with the intention to create equitable mortgage in 1997 to secure various facilities sanctioned to and availed by M/s. Harshita Limited.

14. The objector has also given the reference of Flats No. 303 and 304 which have been ordered to be released from the sale. Therefore, it is contended that there is an error apparent on the face of the record in respect of the Flat No. 306 at the time of settling the sale proclamation as the said property was not correctly sold by the Court Auctioneer which belonged to Sh. Satish Chandra Sharma who was neither the party in the present execution proceedings nor any decree had been obtained by the decree holder. The alternative prayer in the application is also made that in any event the sale consideration/auctioned amount of the property/Flat No. 306 be paid to the objector to which decree holder is not entitled to claim the same.

15. The third application being EA No. 251/2004 was filed u/s 151 CPC for stay praying that in view of the facts stated in earlier two applications the auction purchaser of Flat No. 306 be restrained from selling, parting with, creating any third party interest or otherwise dealing with the property/Flat No. 306, Som Datt Chambers-II, Bhikaji Cama Place, New Delhi.

16. The fourth/last application being EA No. 67/2005 was filed u/s 151 CPC on 8.2.2005 stating that the public auction held on 3.11.2003 and 7.11.2003 in respect of Flats No. 306 and 307 shall be deemed as null and void since the decree holder

has filed to obtain the requisite permission to get the property sold belonging to the judgment debtor which is mandatory by virtue of Section 537 of the Companies Act, 1956. It is prayed in the application that the orders for sale of Flat No. 307 be set aside/quashed and the objection filed by the Punjab National Bank be allowed.

17. EA No. 197/2004 was listed on 4.5.2004. On the said date notice was issued by this Court and interim order was passed that the possession of Flat No. 307, Som Dutt Chambers II, Bhikaji Cama Place, New Delhi, shall not be handed over to the Auction Purchaser in terms of the orders dated 15th March, 2004. EAs No. 250/2004 and 251/2004 were listed before the Court first time on 30.6.2004 wherein the interim order was passed to the effect that auction purchaser shall not sell, part with or create any third party interest in Flat No. 306, Som Dutt Chambers-II, Bhikaji Cama Place, New Delhi and the amount deposited by the auction purchaser in the court shall not be released in favour of the decree holder. In EA No. 67/2005, which was listed on 21.2.2005, notice was issued to the decree holder as well as counsel for the auction purchaser and the interim orders earlier passed in relation to Flats No. 306 and 307 were ordered to be continued by the Court.

18. By order dated 18.7.2005 it was clarified by the Court on the basis of the statement made by the decree holder that Flats No. 302 to 305 were not in the possession of the judgment debtor at the time of the execution of the decree. Therefore, the present execution was now confined only to the two Flats No. 306 and 307 for which the attachment has been effected and even auction has taken place. The sale had been confirmed and possession had been transferred to the auction purchaser in respect of Flat No. 306.

19. The main contention of the auction purchaser of Flat No. 306 is that the application to set aside the sale is barred by limitation as the sale of this Flat took place on 3.11.2003. The application for setting aside the sale was filed by the objector on 22.6.2004 which is beyond the period of 60 days under Article 127 of the Limitation Act. It is also alleged that the objector has no locus standi to file the objection as its interest is not affected by the same on the ground of material irregularity or fraud in publishing and conducting the auction. The objector can claim the said property by an independent suit.

20. It is averred that objection raised by the objector under Order 21 Rule 58 CPC that the Flat No. 306 could not have been auctioned or put to sale could have been raised on or before the date on which the proclamation of sale was drawn up. Now the said objection cannot be entertained in view of the bar under Order 21 Rule 58(a) of the CPC which reads as under:

58(a). Where, before the claim is preferred or objection is made, the property attached has already been sold.

21. As in the present case objections have been preferred after the confirmation of the sale by the objector who is neither the owner nor the judgment debtor and he is

merely claiming the right, title and interest on the basis of equitable mortgage. Therefore, the said objection filed by the objector is barred under the said provision.

22. The other contention is made that the objection under Order 21 Rules 58 & 90 CPC on the ground of irregularity or fraud in publishing and conducting the sale is also barred by time. Under the said provision, the objector was required to establish that there was not only inadequacy of the price but inadequacy was caused by reason of material irregularity or fraud. Neither the objector could produce any cogent evidence in relation to inadequacy of price nor are specific grounds mentioned. Therefore, the objection is completely outside the scope of the said provision.

23. The allegation of the objector that the property was sold at a throw away price was also denied by the auction purchaser. It is alleged that the property was purchased for Rs. 5,50,000/- at the time of auction and there were encumbrances over the said property. The total amount of encumbrances comes approximately to Rs. 8,00,000/-. The auction purchaser has also spent amount for purchase of Non-Judicial Stamp Papers. Thus, the amount comes approximately to Rs. 14,00,000/-.

24. The other auction purchaser of Flat No. 307 has also filed the reply and made his contention inter alia is that the auction of this Flat was held on 7.11.2003. The auction purchaser was declared as highest bidder. He deposited the total bid amount in this Court. Vide order dated 15.3.2004, this Court accepted and confirmed the same and further ordered that the sale certificate and warrants of possession be issued in favour of the auction purchaser.

25. It is contended that the auction purchaser is a bonafide purchaser of the said Flat in terms of order dated 15.3.2004 and he was the highest bidder at Rs. 7,65,000/-. The said amount was deposited in this Court by way of bank draft on 7.11.2003. Similar objection was raised that objection filed by the Punjab National Bank is barred by the provision of Order 21 Rule 58 CPC as no objection would be maintainable if the sale has already been confirmed. The auction purchaser has not denied the averment made in EA No. 67/2005 pertaining to the winding up orders passed by Rajasthan High Court. However, it is argued that the secured creditors are outside the scope of winding up proceedings. Therefore Section 537 of the Companies Act is not applicable even otherwise the same being barred by time. Since the Flat No. 307 belongs to judgment debtor and the said flat has been put for auction after complying all the formalities in accordance with the provisions of law, therefore, there is no merit in respect of Flat No. 307 and EA No. 197/2004 and EA No. 67/2005 be dismissed with cost.

26. On 30th April 2007 it was reported that Mr. B.K. Soni HUF, auction purchaser of property i.e. Flat No. 307 the Karta of HUF has expired on 28th February 2007 and EA No. 215/2007 was filed seeking leave to substitute the name of deceased Karta by

his successor Mr. Aditiya Soni who is the eldest son.

27. Later on by order dated 22nd February 2008, EA was allowed and Sh. Aditiya Soni was ordered to be substituted as the Karta of B.K.Soni, HUF, auction purchaser in respect of Flat No. 307. The second EA No. 48/06 filed by the same auction purchaser for filing the additional affidavit was also allowed by the same order.

OBJECTION TO THE PROPERTY/FLAT BEARING No. 307

28. The objector has filed the objection in relation to flat bearing No. 307 under the provision of Order 21 Rule 58 and 90 CPC which reads as under:

Order XXI - EXECUTION OF DECREES

AND ORDERS

58. Adjudication of claims to, or objections to attachment of, property-

(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained-

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in Sub-rule (2), the Court shall, in accordance with such determination,-

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to Sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute;

but, subject to the result of such suit, if any, an order so refusing to entertain the claims or objection shall be conclusive.

29. It clearly appears from the facts that when the objections were filed by the Punjab National Bank on 22.04.2004, the flat in question was already sold on 13.11.2003 and the entire consideration was deposited in the court. Hence Proviso (a) of Rule 58 would directly apply in the matter and objections filed by the Punjab National Bank are also beyond the period of 60 days, the time provided in Article 127 of the Limitation Act. Undisputedly the auction purchaser of the flat has now become aware of the fact that the property purchased by him is under equitable mortgage with the objector. This flat was admittedly belonging to judgment debtor, its detail was correctly given in the Schedule "C" of the property. The property was sold by the court auctioneer. No cogent evidence has been produced by the objector that there is any irregularity committed at the time of sale. The objections were not filed in time. There is no material on record to show that any fraud has been committed. So in any case, the interest of the objector is not affected by the same. The objector who claim a permanent title to the judgment debtor in the property can raise the said claim by an independent suit or proceeding as in the present case only interest of the judgment debtor in the property is sold. The other submissions raised by the objector are without any substance and have no bearing on the facts and circumstances of the present dispute. Therefore, the objections are not tenable and the same are dismissed. The interim order passed on 04.05.2004 is vacated.

30. In view of the order passed on 15.03.2004 the sale certificate and warrants of possession be issued in favour of the auction purchaser. E.A. Nos. 197/2004 and 67/2005 are disposed of.

OBJECTION TO THE PROPERTY/FLAT BEARING No. 306

31. In view of the facts mentioned in the earlier part of the order, it is clear that no execution for attachment of this flat was filed. Schedule "C" does not contain the details of immovable property in respect of this flat. The flat was sold on 07.11.2003. Vide order dated 15.03.2004 the auction was accepted by the court and an order to issue sale certificate was made. The auction purchaser also took the possession of the said flat. The objections were filed by the objector/Punjab National Bank on 23.06.2004 which is admittedly after the expiry of 60 days. However, the said objections are also filed under Rule 90 of Order XXI CPC which reads as under:

90. Application to set aside sale on ground of irregularity or fraud

(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon an ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

32. It reveals from the record that notice of proclamation of sale in respect of flat No. 306 was prepared along with other flats bearing Nos. 302 to 305 which were not in the list of immovable properties of Schedule "C" attached with the execution petition. One is failed to understand as to why such an error took place while settling the proclamation notice, although later on this Court passed an order in respect of flat No. 303 and 304 to the effect that those flats should not be put to sale in the execution of warrants of attachments issued by this Court. In the objections filed by the objector/Punjab National Bank, certain serious allegations for irregularity and fraud in publishing the sale proclamation and conducting the sale in respect of this flat have been made. The learned Counsel for the objectors has also referred various decisions in support of his submissions. Relevant decisions referred by him are:

a) In case titled as [A.P. Ismail Rowther Vs. Mynoon Bivi and Others](#), it is held that:

(b) Civil. P.C. (1908), Section 151 - Court has got inherent power to set aside sale on ground of material irregularity or fraud, even though the petitioner had locus standi or not to file application for setting aside the sale.

....

Even if the person who brought to light the fraud had no locus standi either u/s 47 or Order 21, Rule 90, the court had an ample reserve of inherent powers to satisfy itself suo motu that its process had been abused. Because the source of information happened to be a person who had no locus standi, the court could not close its eyes and decline to exercise its inherent powers to set aside the sale on being satisfied that as a result of conspiracy a fraud had been perpetuated and its process had been abused.

b) In the case of [Punjab Mercantile Bank Ltd. Vs. Sardar Kishan Singh](#), it is held that:

Where fraud was perpetrated, length of time would not be admitted to refuse relief - Party who wrongfully concealed facts would not be allowed to take advantage of his own wrong by setting up the law of limitation - Even if the person who brought to light the fraud had no locus standi, either u/s 47 or Order 21 Rule 90 the Court had an ample reserve of inherent powers to satisfy suo motu that its process had been abused.

33. The learned Counsel for the auction purchaser Mr. Mann has argued that the objections are barred by limitation and are not maintainable after confirmation of sale by this Court. He has referred few decisions on this aspect.

34. Although Article 127 of the Limitation Act is quite general and applied to all applications based on whatever grounds to set aside the sale in execution of decree but where there was non compliance with the order fixed by the execution court for selling property then the question of limitation does not arise. It will not apply inter alia in the following cases:

- a. Where there was non compliance with the order fixed by the executing court for selling property;
- b. Where there was fraudulent concealment of proceedings till the time of the sale;
- c. Where after amendment of the application permitting a different item to be sold in the place of the original one.
- d. In case of clear evidence of fraud upon Court and its own carelessness in approving the sale proclamation.

35. Scope of Rule 90 of Order XXI is that where the immovable property has been sold in execution of a decree, the application filed by the decree holder or any other person whose interest are affected by the sale, to set aside the sale on the ground of irregularity or fraud is maintainable and as per the settled law if there is an irregularity or fraud in publishing or conducting it or if the irregularity or the fraud is apparent one then the court has the jurisdiction to set aside the sale on filing of an application. No doubt, the objector in the present case has given the specific particulars of irregularities, thus, contentions of the auction purchaser have no force. The decisions referred by the counsel are not applicable to the facts of this case. It is pertinent to mention in the present case that the decree holder and judgment debtors did not bring to the notice of this Court about the occurrence of error in issuance of proclamation of sale until objections were filed by the objector pertaining to this flat rather they chose to file the evasive replies to the objections filed by the Punjab National Bank.

36. It is also a matter of fact that the flat in question is not belonging to the judgment debtor. It is owned by the Chairman/Managing Director of the Judgment Debtor's company in individual name who was not the party in the suit and in execution proceedings.

37. For the aforesaid reasons, it appears that there is an apparent error and irregularity which had taken place at the time of settling the draft of sale of proclamation of flat No. 306, Som Dutt Chambers-II, Bhikaji Cama Place, New Delhi, the property which was not mentioned in Schedule "C" of the list of immovable property. Thus, the orders of sale of property/flat No. 306, Som Dutt Chambers-II, Bhikaji Cama Place, New Delhi are recalled. The auction purchaser is given three months time to deliver the possession of the flat to this Court by depositing the keys of the said flat. The auction purchaser, however, is entitled to receive the refund of the amount deposited by it with the Registrar General of this Court along with interest accrued thereon.

38. In view of the above, E.A. Nos. 250 and 251/2004 are disposed of with liberty to the objector to file the objections in accordance with law in-case of filing of fresh execution by the decree holder for the balance amount due in respect of flat No. 306.

39. The execution petition along with pending E.As. are disposed of.